Jefferson Electric Company, a Division of Litton Systems, Inc. *and* International Brotherhood of Electrical Workers, Local Union 1533, AFL-CIO-CLC. Case 9-CA-16403

21 August 1984

DECISION AND ORDER ON REMAND

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 8 June 1982 Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent terminated employee Yvonne Bonnie Hoskins because she engaged in union and protected concerted activity. The Respondent has excepted to the judge's findings that its conduct violated Section 8(a)(1) and (3) of the Act. We find, contrary to the judge, that Hoskins' filing of a state OSHA complaint did not constitute concerted activity under the Act.

The Respondent manufactures electrical transformers at its plant in Williamstown, Kentucky. Until April 1980,[2] the Respondent produced its own transformer fuses. The fuse production process required heating a mixture of acid and resin. The process released fumes which were normally removed from the plant through an air vent. On 23 April the vent became clogged. Although some employees complained to the Respondent about the fumes, the process continued throughout the day. The next day approximately 11 employees were sent to the Respondent's doctor. Three of the employees, including Hoskins, were admitted to a hospital. Hoskins remained in the hospital for 2 weeks—longer than any hospitalized employee. She spent 3 additional weeks recuperating at home.

While hospitalized, Hoskins filed a complaint on 28 April with Kentucky OSHA, citing the incident that resulted in her injury. There is no evidence that Hoskins solicited the support of other employees before she decided to file the OSHA complaint. The Respondent was cited for a safety violation and in late August paid a $240 fine.

The Respondent failed to post the citation, and Hoskins notified Kentucky OSHA. Again, there is no evidence that, before her second OSHA contact, Hoskins solicited the views of the other employees regarding the Respondent's failure to comply with OSHA posting requirements. OSHA representative Kelly Servant thereafter visited the plant to monitor the Respondent's compliance with the citation. Personnel Manager Bill Buffin escorted Servant to the plant floor. There, against Buffin's expressed wishes, Servant spoke with Hoskins and other department employees. During the plant floor conversation Servant told Hoskins, "Well, I've talked to you on the phone . . . . You're the one that talked to Otis . . . [another OSHA representative]." Buffin overheard the conversation.

IBEW, Local 1533 (the Union) began an organizing campaign at the Respondent's plant in June or July. The judge found that Hoskins actively supported the Union[3] and that the Respondent discharged her on 28 January 1981.[4]

The judge concluded that Hoskins' discharge violated Section 8(a)(1) and (3) of the Act. For the reasons set forth below, we shall dismiss the 8(a)(1) complaint allegation.

The Board's *Meyers Industries*[5] decision rejected the per se standard of concerted activity and overruled *Alleluia Cushion Co.*, 221 NLRB 999 (1975). *Meyers* held that an employee's activity is concerted when "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[6] There is no evidence that Hoskins filed the state OSHA complaint with or on the authority of other employees. The record is similarly silent regarding employee involvement in Hoskins' subsequent charge that the Respondent failed to comply with that agency's posting requirements. We therefore conclude that Hoskins' actions do not fall within the *Meyers* definition of concerted activity.

The judge found that Hoskins' discharge also violated Section 8(a)(3), relying on Hoskins' role in the organizing campaign. The judge found that the Respondent's asserted reason for Hoskins' discharge—her refusal to work near the chemical that

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates occur in 1980 unless otherwise indicated.

[3] The judge's factual findings concerning Hoskins' precise role in the organizing campaign are fully set forth in the decision.

[4] The judge's factual findings concerning the Respondent's asserted reasons for Hoskins' discharge are fully set forth in the decision.

[5] *Meyers Industries*, 268 NLRB 493 (1984).

[6] Id. at 497.

caused her illness—was pretextual. The judge also said, however, that *Wright Line*[7] "does not apply." We disagree. In *Limestone Apparel*[8] the Board stated it "would apply the [*Wright Line* analysis] to all cases alleging violations of Section 8(a)(3) and (1) turning on employer motivation."[9]

The judge did not clearly delineate whether the Respondent discharged Hoskins because she complained to OSHA, because she engaged in union activity, or both. To the extent that Hoskins' discharge was motivated by her OSHA-related activity the discharge is not unlawful.

We shall therefore remand the 8(a)(3) allegation to the judge for analysis, decision, and recommended Order consistent with *Wright Line* and with this Decision and Order.

ORDER

The complaint allegation that the Respondent violated Section 8(a)(1) of the Act is dismissed.

IT IS FURTHER ORDERED that the above-entitled proceeding is remanded to Administrative Law Judge John H. West for analysis, decision, and recommended Order consistent with *Wright Line* and with this Decision and Order.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact upon the entire record, conclusions of law, and a recommended Order consistent with the remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, shall apply.

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[8] *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

[9] Id.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed February 3, 1981, by International Brotherhood of Electrical Workers, Local Union 1533, AFL-CIO-CLC, hereinafter called the Union, a complaint was issued by the General Counsel on March 16, 1981, alleging that Respondent Jefferson Electric, Division of Litton Systems, Inc.,[1] violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by discharging Yvonne Bonnie Hoskins assertedly because she supported or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent denies the allegation.

A hearing was held in Williamstown, Kentucky, on December 10 and 11, 1981, and January 6, 7, and 8, 1982. On the entire record[2] in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an unincorporated operating division of Litton Systems, Inc., of Delaware, manufactures electrical transformers at the involved Williamstown facility. The complaint alleges, the Respondent admits, I find that at all times material herein Respondent has been an employer and engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On January 28, 1981, Hoskins was asked to leave her normal job in the subassembly area of Respondent's plant and work in the final assembly area of the facility. The task assigned her by management would have placed her in close proximity (described by Hoskins as 1 foot) of a liquid used for cleaning purposes, which liquid is said to be mineral spirits. While apparently Hoskins formerly had experienced no patent ill effects working with the cleaning fluid, after spending 2 weeks in the hospital in April and May 1980 as a result of inhaling fumes given off by a process involving the mixing of acid and resin at Respondent's plant, she could not work with the mixing of acid and resin at Respondent's plant, she could not work with the cleaning fluid. A doctor's statement was given to Respondent on October 2, 1980, stating that "Hoskins avoid petroleum distillates (mineral spirits) if at all possible." General Counsel's Exhibit 5. Nevertheless, Respondent assigned the task asserting, at the hearing, that Hoskins was not asked to use the cleaning fluid and would be no nearer the cleaning fluid in the final assembly area than she was at times in her normal work area. When Hoskins refused to perform the assigned task stating that she was afraid that it would make her sick and her doctor advised against it, she was told by Respondent that she was terminating her own employment. According to Respondent, Hoskins' employment was severed for no other reason. The General Counsel disagrees. For the reasons stated below, it is my opinion that there

[1] At the beginning of the hearing herein, counsel for Respondent pointed out that Respondent's name is Jefferson Electric Company, a Division of Litton Systems, Inc.

[2] Respondent's unopposed motion to correct the transcript, dated March 3, 1982, is granted and received in evidence as R. Exh. 32.

is merit to the the General Counsel's assertion that Hoskins was unlawfully terminated by Respondent.

Hoskins began working for Respondent on September 18, 1978. Normally, she worked in the subassembly area making capacitors, moulds, and fuses. Although her work station in subassembly changed some, for the most part (said to be about 70 percent of the time) Hoskins worked at a table the furthest side of which (where she normally worked) was between 15 and 17 feet from the repair table where personnel in the repair department normally used the involved cleaning fluid.[3] Repair personnel sometimes used the cleaning fluid at one side of a 4-foot-wide table, the nearest side of which (the side opposite where the cleaning took place) was located between 7 and 8 feet from Hoskins' normal work station. It was not credibly demonstrated that subsequent to April 1980 Hoskins worked in the subassembly area within 1 or even 2 feet of the involved cleaning fluid when it was being used.[4]

A part of the fuse making process at Respondent's plant was the heating of a mixture of acid and resin. On April 23, 1980, the air vent through which the fumes from this process are normally drawn out of the plant was apparently clogged. The heating of the mixture took place about 10 feet from Hoskins' normal work station. Some of Respondent's employees complained about the fumes. The following day over 10 of them were sent to the doctors used by Respondent. Three of the employees, including Hoskins, were admitted to a hospital. Of the three, Hoskins' hospital stay was the longest, and she spent 3 additional weeks recuperating.[5]

On April 28, 1980, Hoskins filed a complaint with the Occupational Health and Safety Administration (OSHA) section of the Kentucky Department of Labor regarding the above-described incident. The matter was investigated, and Respondent received a citation. By check dated August 25, 1980, signed by both Cummings and Bill Buffin, Respondent's personnel manager, Respondent paid a $240 OSHA fine or penalty. When the citation was not placed on Respondent's bulletin board as required, a representative of the Department of Labor came to the plant and discussed the matter with Hoskins, among other subassembly personnel, in the presence of Buffin. Hoskins testified that when she was introduced to the representative he said, "Well, I've talked to you on the phone . . . . You're the one that talked to . . . [another representative of the Department of Labor]." Initially Buffin testified that he never overheard any conversation between Hoskins and a Department of Labor representative. Later he testified that he did overhear the conversation but he did not recall what the representative said to Hoskins.[6]

Both Hoskins and McClure testified that after the April 1980 incident they were more sensitive to fumes. The latter testified that when she was around the involved cleaning fluid she would start to breathe heavy and get flushed.

About 3 or 4 weeks after returning to work, in late June or early July, Hoskins was told to leave her normal work area and assist in the final assembly area, where she was assigned to use the involved cleaning fluid. After working with the fluid for about 2 hours Hoskins became ill. She was permitted to rest in the locker room for about 1 hour and then she went back to work doing something which did not involve the use of the cleaning fluid.

During the 1980 union organizing campaign at Respondent's involved plant, which began in the summer of that year, Hoskins passed out 12 authorization cards at a grocery store which is located about 1 mile from Respondent's involved facility, and she wore union buttons while at work.[7] At one of the meetings which the Com-

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[3] Where the cleaning fluid was stored in metal containers is not determinative since the fumes were given off only when the fluid was used.

[4] Lorine Orick, a repair employee, testified that she saw Hoskins making a certain fuse at the same table which the repair personnel sometimes used for cleaning (Hoskins worked at the side opposite the repair personnel) but Orick could not remember seeing Hoskins there when repair personnel were using the cleaning fluid at the same table. Additionally, the fuse in question was discountinued immediately after the aforementioned April 1980 incident. Supervisor Juanita Brown initially testified that she observed Hoskins working at the table repair personnel sometimes used for cleaning when repair personnel were actually using the cleaning fluid. When counsel for Respondent asked for the time period Brown replied May 1980. Respondent's counsel then attempted to introduce Hoskins' doctor's statement allowing her to return to work after the aforementioned incident, which statement had already been received in evidence (G.C. Exh. 8). The doctor's statement is dated May 30, 1980, and allowed Hoskins to return to work on June 2, 1980. She was still recuperating during May 1980 and, therefore, could not have been working at the table. Brown's testimony about Hoskins working at the table then became generalized and Brown did not testify that she actually saw Hoskins at the table subsequent to April 1980 while repair personnel were using the cleaning fluid. Hoskins testified that while she occasionally worked at this table she never saw repair personnel using the cleaning fluid on ballasts stacked on the table. A current subassembly employee Kathy Wainscott testified that she never saw repair personnel use the cleaning fluid on the table in question. Another repair employee Elizabeth Bowman testified that sometimes repair pesonnel used cleaning fluid at the table in question but Hoskins was not working at the same table but rather at her normal work station at another table.

[5] Hoskins' symptoms were as follows: numb hands and feet, difficulty in breathing, weak, high blood pressure, hands and feet turned blue, pulse rate 280 at one time, sore throat, eyes inflamed and sensitive to light, could not keep food in stomach, rash on face and her skin peeled. She was given oxygen and her heart was monitored. One of the other employees hospitialized, Doris McClure, complained of difficulty in breathing and being nauseated. Also, her skin turned red from head to toe. She worked near the above-described process but not for the entire day. After spending 5 days in the hospital she recuperated for 1 week. Another of Respondent's employees Kathy Wainscott testified that she went to see a doctor when she experienced difficulty in breathing and a tightening in the chest.

One of the Doctors used by Respondent testified that Hoskins' main problem was what he described as an anxiety neurosis. Assertedly, Hoskins suffered from hyperventilation. But the doctor used by Respondent was unable to explain certain of Hoskins' symptoms in view of his diagnosis. Hoskins' family physician had her transferred from the hospital were the doctor used by Respondent practiced and Hoskins spend the second week of her hospitialization under her own physician's care.

This was the last time this process took place for the next morning, according to Plant Manager David Cummings, it was determined that it was less expensive to purchase the fuse than to make it.

[6] Contradicting Buffin and contrary to all other credible evidence of record, Brown testified that Buffin was with her when the Department of Labor representative spoke to Hoskins shortly after her return to work following the April incident, and that both of them were some distance away from Hoskins or in her words, "out of ear shot."

[7] The buttons, which are 3 inches in diameter, read "VOTE I.B.E.W." G.C. Exh. 3. Hoskins' immediate supervisor Brown testified that Hoskins wore union buttons for about 3 weeks before the election, which was

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pany held for its employees, Hoskins defended the Union in an exchange with Robert Lee, a company representative of Litton Industries who flew in from California to conduct the meetings on behalf of Respondent.[8] According to Brown this meeting took place at least 2 weeks before the election. On another occasion, after being advised that the Company did not allow employees to ask questions at the morning session, Hoskins attended the afternoon company meeting wearing a shirt with the following written on the front: "POLISH PEOPLE RISKED BEING SHOT, OR PUT IN JAIL FOR THE RIGHT TO FORM LABOR UNIONS. ALL WE HAVE TO DO IS VOTE *YES*," and the following written on the back: "COMMUNISTS DON'T LET YOU ASK QUESTIONS EITHER! VOTE YES." General Counsel's Exhibit 2. When Hoskins made her grand entrance wearing the shirt some of the employees attending the meeting cheered, some laughed, and some booed. Cummings and Buffin were present. Employees were allowed to ask questions at this session. Apparently the latter meeting was held the day before the election.

On September 25, 1980, 4 weeks before the election, Hoskins was told to report to final assembly and use the involved cleaning fluid. She explained to management that she became ill the last time she used the fluid. Plant manager Cummings told Hoskins to get a doctor's statement and she was sent back to subassembly. As indicated supra, Hoskins obtained a doctor's statement and she gave it to Respondent on October 2, 1980.

Twelve days later, October 14, 1980, Hoskins was again told to report to final assembly to use the cleaning fluid. Again she explained to management that working with the cleaning fluid made her ill. Also, she stated that she had turned in a doctor's statement. Jerry Scroggins, the supervisor of final assembly, then stated that he had already looked in her personnel file and the doctor's statement was not in it. Hoskins advised Scroggins that she had a copy of it in her billfold. He then took her to Buffin's office where she observed her personnel file on Buffin's desk. Brown was asked to attend the meeting. Regarding the meeting, Hoskins testified as follows:

> [Buffin] said that the doctor's statement wasn't good, and I said, well, I thought he meant with working on it, and I said, well, how would you like the doctor to give it, and he said it doesn't matter what you bring in here, we want you to scope and clean [with the involved cleaning fluid]. And I told him that I didn't want to intentionally endanger my health, and I just didn't feel I could do it. And he said that was the only job he had for me to do, and what would my answer be? And I told him I couldn't do it because it would endanger my health and he said he would like me to wait in the lobby and he would talk to Mr. Cummings about it.[9]

Hoskins did not have to use the cleaning fluid that day and she returned to her normal department, subassembly. Before arriving there, however, she overheard another employee, Elizabeth Bowman, offer to Brown to take Hoskins' place in final assembly and Brown "kind of laughed and said no."[10] Hoskins' testimony regarding what occurred and what was said on October 14, 1980, is credited.

Since repair personnel, in order to repair units, were knowledgeable in many facets of Respondent's operation, this department was, as described by Cummings, the "draw" department. In other words, when other departments needed personnel on a temporary basis, normally the temporary workers came from the repair department. Cummings, upon hearing complaints that repair personnel believed that this was not fair, advised them that temporary transfers would be assigned on a more equitable basis. When this was not done, repair personnel complained again and on October 14, 1980, after meeting with Cummings, they were promised that a rotation program would be set up.[11] Two of the workers in the

held on October 23, 1980. At least one other employee testified that she saw Hoskins wearing a union button a couple of weeks before the election. Initially Buffin, who walks through the plant daily, testified that he did not see Hoskins wear a union button during the campaign. Later he testified that he did "not recall seeing Hoskins' Union button until she was wearing this shirt [described *infra*] . . . at the very end of the campaign when she was very outspoken, certainly I was aware of that. But I cannot testify that I observed or saw her wearing union buttons. She could have been. I cannot recall that or testify to that fact." Cummings testified that he did not see a union button on Hoskins at any time prior to the union election.

[8] Lee stated at the meeting that he had been refused a copy of the union bylaws and that assertedly there were 12 pages of penalties that could be assessed against members. Hoskins showed a copy she had of the bylaws but refused to let Lee see it saying that anyone could see it at anytime they wanted to at a union meeting. When Lee's offer of a trade was turned down by Hoskins, Lee, according to the testimony of Hoskins, "started laughing and got a very red face" Another employee attending the meeting, John Ison, testified that Lee was embarrassed.

[9] Scroggins testified that while he accompanied Hoskins to Buffin's office he did not stay for the meeting. Buffin testified that, after discussing the matter with Hoskins, he asked her to wait outside his office; that Cummings was consulted by Buffin and it was agreed that Hoskins would have to give a more specific reason as to why she could not work around the cleaning fluid and that the doctor's statement was not valid; that he then told Hoskins that the doctor's statement did not excuse her from working in or around areas where there were mineral spirits; that Hoskins did not indicate that she would get another statement; that he told Hoskins that she could go back to her regular work area; and that at the behest of Cummings later on October 14, 1980, he called the company doctors to schedule an appointment for Hoskins but was advised by a company doctor that it would be a waste of time because the doctor could not make a determination regarding Hoskins and her complaints that the cleaning fluid gave her a headache and made her dizzy and sick. Brown testified that she did not recall Hoskins asking Buffin how he would like the doctor to give the statement or Buffin saying that it did not matter what Hoskins brought in. Rather, Brown testified that she recalled Buffin saying that he needed something more specific; and that if Hoskins could not work in the cleaning fluid, then a doctor had to say that. Brown testified that she thought Hoskins said "okay I'll go get a doctor's statement, another doctor's statement." Once again Brown contradicted Buffin's testimony and other credible evidence of record. See fn. 6 supra. A motion to sequester the witnesses was granted and Brown did not know how Buffin previously testified. She impressed me as being an individual whose version of what was said would be presented in such a manner as to cast her employer in the best light possible. Brown was not a credible witness.

[10] Regarding this portion of Hoskins' testimony, Bowman initially asserted that she did not remember offering to substitute for Hoskins, testifying "I don't think I ever offered to clean for anybody. I am sure I didn't." Later she testified that she did offer to clean for one other employee in the repair department. Brown denied that Bowman offered to take Hoskins' place. Bowman's testimony is equivocal and Brown, for the reasons given above, was not a credible witness.

[11] Cummings' testimony about what one of the repair personnel said while leaving his office is not credited. Two repair personnel testified

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repair department, Bowman and Orick, testified that they did not resent being transferred to perform any specific task, but rather they resented being taken out of their department and moved around. (They constantly used the involved cleaning fluid in their own department.)[12]

As indicated supra, the election was held on October 23, 1980. The Union lost by three votes (74–71). The year before the Union lost by a two-to-one margin. Objections were filed by the Union regarding the 1980 election and the Board affirmed the decision of the Regional Director overruling the objections and certified the results of the election on January 21, 1981. The Board's certification of the results of the election were received by Respondent shortly after January 21, 1981.

At 2 p.m. on January 28, 1981, Brown told Hoskins, along with at least one other employee in her department, to go to final assembly and work for Scroggins. When she arrived in final assembly, Hoskins was told to work at that portion of final assembly line A where the involved cleaning fluid is used. She refused telling Scroggins that the cleaning fluid made her very ill and pointing out that she had a doctor's statement. Hoskins was then told to go to the front of the line and perform a task which did not involve the cleaning fluid.

During the day it is not possible to scrape and clean all of the ballasts as they come down the line, especially if the model being manufactured is one which requires more scraping than normal. Such was the case on January 28, 1981, and throughout the day an unspecified number of ballasts had been placed on a rolling table near the line to be scraped and cleaned during the last 30 minutes of the shift, from 4 to 4:30 p.m. At 4 p.m. that day, as was the standard operating procedure, the front of the line was shut down. The workers on the front of the line were sent to the end of the line to process the remaining units. Scroggins asked Hoskins to scrape. She observed that "there were so many girls at the end of the line that they were getting in each other's way," and that if she stood where she was directed by Scroggins to stand, she would have been 1 foot away from the cleaning fluid which was being used.[13] Once again Hoskins informed Scroggins that the cleaning fluid would make her very ill and once again she referred to her doctor's statement. Scroggins took Hoskins to Buffin's office and Scroggins remained there throughout most of the meeting described infra.

Buffin had Hoskins' file on his desk. Brown was called in. According to Buffin, Hoskins was then advised by him that she had two options; she could try to scrape the units or if she refused she was terminating her own employment. Buffin also advised Hoskins that she could possibly be assigned to do scraping the next day or the day after that.[14] At the hearing Buffin testified that Hoskins could have been assigned tasks normally assigned to her, i.e., assembling fuses or capacitors,[15] but that is not where she was needed; and that while some action short of discharge, such as suspension or warning,[16] may have

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and, when asked about what was said on the way out of Cummings' office, neither corroborated Cummings.

[12] Buffin, who did not attend the meeting between Cummings and repair personnel, testified that these employees complained "that each time someone was needed they were the ones that had to go over and do the stinking scraping job and do the cleaning job and go over and do the other jobs."

[13] Scroggins testified that he did not remember whether he told Hoskins where to stand at 4 p.m. In the circumstances, Hoskins' testimony is credited. Credible testimony of witnesses called by both sides, including those in management, demonstrates that management did not concern itself with anything other than getting the units scraped and cleaned. According to Plant Manager Cummings, employees could be stumbling over each other while they scraped and cleaned. He did not care as long as the units were scraped and cleaned. Some of the witnesses testified that at the end of the day when many workers are scraping and cleaning there would be two cans of the cleaning fluid and they would be placed anywhere they were handy to the people using them. Others testified that they only saw one can of cleaning fluid in the involved area at the end of the workday. Scroggins conceded that on occasion there was more than one can of cleaning fluid in the involved area in final assembly. In any event, the number of cans is not determinative. Rather, Hoskins' proximity to the cleaning fluid is decisive. Her testimony that at 4 p.m. she would have been 1 foot away from the cleaning fluid which was being used is not refuted by credible evidence and, consequently, Hoskins' testimony is credited.

[14] Scroggins testified that Buffin told Hoskins that he did not know whether she would be assigned to work near the cleaning fluid scraping and cleaning in final assembly the next day because he did not know whether Respondent would get a repair part for the Venus machine used on final line A which would have obviated the need for the number of scrapers and cleaners required to remove drylock when the machine was not in operation. According to Cummings, the Venus machine broke down on January 27, 1981, repair parts were ordered, they arrived on January 28 and 29, 1981, and the machine was operational on January 29, 1981. See R. Exh. 23, attached hereto as Appendix A [omitted from publication], which was sponsored by Cummings and is a business record maintained by Respondent. It was introduced to show when the Venus machine broke down and when the repair parts arrived. This document will be treated more fully infra.

[15] Scroggins testified that Buffin told Hoskins that "this is the only job we got, we don't have any other job available for you." Hoskins testified that she had work in her own department, viz., wrapping 2500 capacitors, filling an order Brown gave her that morning for 800 fuses, and assembling 2000 capacitors; that normally the fuses were made by another employee but the other employee had another order to fill; that she had made 400 of the fuses and it would have taken her the rest of the day to fill the order; and that it would have taken her a couple of days to wrap the capacitors. Brown testified that the employee normally assigned to make the fuses assembled the remaining 400 fuses; that since Brown did not have an order for the 2000 capacitors it was not necessary for Hoskins to make them that day and this is why Brown assigned Hoskins to make the 800 fuses; and that the fact that there were 2500 capacitors on final line A to wrap meant that she was 2 days ahead of the line on that capacitor.

[16] At least two other of Respondent's employees who were assigned permanent jobs which involved the use of the involved cleaning fluid were permitted to transfer after they advised management that they could not work with the cleaning fluid. McClure, who was hospitalized over the April 1980 incident described above, did not have a doctor's statement. Debbie Edwards Feltner did have a doctor's statement. The former accepted a lower paying job which involved working with mineral spirits diluted with 30 weight oil. Hoskins was never permanently assigned a job which involved using the cleaning fluid. Rather, four or five times a year for part of a workday Hoskins was sent over on a temporary basis to perform a task which involved either working with or near the cleaning fluid. A number of other employees complained about the effects of working with the cleaning fluid. Wainscott's hands got red, broke out, and got numb. She normally worked in final assembly and complained to no avail. Shelia Taylor's hands got red and she was given a protective cream. She continued to complain but continued to work as a cleaner in final assembly. Respondent introduced evidence showing that three probationary employees hired, after Hoskins' departure and after the charge was filed herein, to work in final assembly as cleaners experienced problems (two suffered skin irritation and the third, after complaining about the fumes, had to lay down in the first-aid room) working with the cleaning fluid, and all three were terminated by Respondent because they had not "adapted." Buffin was asked twice if he could state how

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been available, Hoskins made her own decision. Hoskins advised Buffin she could not perform the assigned task because she was afraid it would make her sick and her doctor advised against it.

In his decision dated April 3, 1981, in AD #81-2322, *Yvonne B. Hoskins v. Jefferson Electric*,[17] a hearing officer of Kentucky's Department of Human Resources, Bureau of Social Insurance, Division of Unemployment Insurance, as here pertinent, stated as follows:

> The claimant was employed with the captioned company as a general factory laborer in sub-assembly. She last worked as an auto-splice operator. The company discharged her on January 28, 1981, when she refused to accept temporary reassignment to another job.
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> The last day, the claimant was asked by management to work on a final assembly job known as "clean and scrape". The operation involved scraping dried compound from finished parts and then cleaning them off with rags soaked in mineral spirits. The claimant was instructed to scrape the parts while nearby workers would be cleaning. She refused to accept the reassignment because she is allergic to mineral spirits. She was taken to the assembly line and shown where she would have been working. A container of mineral spirits with a pump was located within arm's reach of where the claimant was told she was to work. Other workers used the pump to wet their cleaning rags and were working within a few feet away. The claimant told the supervisor assigning her there of her allergy and the fact that a statement from her doctor to that effect was on file in the personnel office. The supervisor stated that the medical statement was not "acceptable" and when she continued to refuse the reassignment, took her to the personnel office where she was discharged.
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> The company's personnel manager had previously accepted a medical statement from the claimant advising that she should avoid exposure to petroleum distillate. The claimant had on a prior occasion been excused from working on the clean and scrape operation because of her allergy. On the last day, there was work available in the claimant's regularly assigned department.
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> DECISION: The adjusted determination is set aside. It is now held the claimant was discharged, but not for misconduct connected with the work. The employer's reserve account is charged.
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> REASONS: KRS 341.370 (1)(B) and (1)(c) respectively provide for the disqualification of a worker from receiving benefits where she was discharged for misconduct connected with the work or voluntarily quit suitable work without good cause attributable to the employment. KRS 341.530 (3) provides that benefits paid to an eligible worker and chargeable to an employer's reserve account shall be charged against the pooled account if such worker was discharged for misconduct connected with his most recent work with such employer or voluntarily quit his most recent work with such employer without good cause attributable to the employment.
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> The employer herein asserts that the claimant should be subject to disqualification from benefits, citing a 1948 Commission Order wherein the worker voluntarily quit his job which required exposure to fumes from varnish stains to which he had a reaction. In ruling that the employer's reserve account was not chargeable under KRS 341.530 (3), and that the worker voluntarily quit without good cause attributable to the employment, the Commission stated: "The test under this standard (Section 341.100) is whether the work is suitable to the ordinary or average worker similarly situation. The reaction of an individual worker and his acceptablility to the agents used in the job operation do not render the work unsuitable in nature if the ordinary, average worker experiences no difficulty." This position has been restated by the Commission on occasion in more recent Orders. (See Commission Order #5429). Such reasoning, however, uses a tortured logic since it is clear from KRS 341.100 that in determining whether work is suitable for a particular worker, we shall consider "the degree of risk involved to his health." At any rate, the Commission has never used this argument to disqualify a worker from benefits but only to facilitate relieving the employer's reserve account in certain cases where benefits could be charged to the pooled account. This line of Commission Orders moreover may be distinguished from the case at hand and [sic] that claimant herein did not voluntarily quit, but was discharged by the employer. Since the claimant was discharged, the real question is whether the discharge was for misconduct so as to warrant a disqualification from benefits and permit relief of charges to the employer's reserve account? The simple answer is that there was no misconduct on the part of the claimant.
>
> The time honored definition of industrial misconduct is found in a Wisconsin case, *Boyton Cab Company vs. Neubeck*, 237 WIS 249, which stated: ("the term 'misconduct' . . . is limited to conduct evinc-

many employees were terminated between January 1979, when Buffin became personnel director of Respondent's involved facility, and March 1981, when the first of the three above-described probationary employees was terminated, because they had problems working with the involved cleaning fluid. After stating that he would have to check the records on that, Buffin testified that "[i]t is very safe to say that yes, there have been other employees during that period of time that has been hired to do the job that entailed difficulties of those reasons and other reasons that could not or did not perform the job and were discharged." Respondent introduced R. Exhs. 8, 9, and 10, to support Buffin's testimony that the three above-described probationary employees were released for "not adapted." No such evidence was ever introduced to demonstrate that anyone was released for a similar reason prior to the charge being filed herein.

[17] G.C. Exh. 7. Hoskins testified and she called David King, Ison, and Wainscott as witnesses. Witnesses testifying on behalf of Jefferson Electric were Buffin, Brown, and Scroggins. Jefferson Electric was represented at the hearing by Mark Boysen of the National Employer's Counsel, Inc. While the decision indicates that a party adversely affected may appeal within 15 days of the decision's mailing date, Respondent did not indicate that it in fact filed an appeal.

> ing such willful or wanton disregard of an employer's interest as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. . . .") As a general rule, it is the employer's prerogative to assign workers in such a way as it feels best serves a legitimate business interest. However, a worker has the right to refuse work which is injurious to her health. The weight of evidence clearly establishes that the work assigned in the present case was injurious to the claimant's health and that the company's management was so advised and in possession of a doctor's statement to that effect. It is therefore concluded that the claimant was discharged for other non-disqualifying reasons and that benefits are chargeable to the company's reserve account.

The chief investigator for the Kentucky Department of Labor (Department) J. C. Grider testified herein that for the last 5 years he has investigated discrimination charge cases such as the one filed with the Department by Hoskins subsequent to the termination of her employment with Respondent; that during this period he had been involved in several hundred cases; and that as a result of his investigation of Hoskins' discrimination charge[18] he concluded that Hoskins had been discriminated against because

> Hoskins' normal work station was at one part of the plant, and she was asked to go in another part of the plant, which wasn't her normal work station and work around the certain chemical which she was allergic to. She has a doctor's statement, which I have a copy of, for her not to be around this particular chemical. And I feel that the company knew that she had this doctor's statement and that if they asked her to work in this area, she would have to refuse and that would give them an excuse to terminate her.

The Kentucky Department of Labor has filed a civil action against Jefferson Electric in the Grant County Circuit Court over Hoskins' discharge.

B. *Contentions*

On brief, the General Counsel contends that Hoskins was discharged in retaliation either for her participation in the organizational efforts of the Union or for her involvement in protected concerted activities, to wit, protesting being required to work with chemicals that caused her and other employees to become ill. What the General Counsel describes as Respondent's sole defense, viz., that repair personnel were upset because they had to scrape and clean on the final assembly lines and they had to be appeased, is assertedly not supported by the record since repair personnel testified that they scraped and cleaned in the final assembly area only three to five times a year and they did not complain about the scraping and cleaning but rather about the lack of general rotation around the plant. Regarding animus, the General Counsel argues that "[n]ot only was Hoskins a key organizer in the plant but she was also a persuasive force for unionization at the plant. She was an articulate and composed spokesperson who was able to stand up and successfully challenge Lee's stock arguments and garner employees' support." General Counsel's brief p. 4. It is contended by the General Counsel that it is probable that management at Respondent's involved facility found out about the Board certification of the results of the 1980 election on January 23 or 26, 1981. Hoskins was then asked to perform a job which, the General Counsel argues, all parties she the would refuse to do. Buffin assertedly was pressuring Hoskins to quit on January 28, 1981 when he told her she could be assigned the same task the next day for, according to the General Counsel, Buffin knew this was not possible since Hoskins would not be assigned this task again until there was a complete rotation, which would not likely have occurred in 1 day. In view of the fact that, in the General Counsel's opinion, the discharge was pretextual, assertedly *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), does not apply.

Respondent, on brief, argues that there is no evidence of animus since (a) no unlawful statements have been attributed to Respondent, (b) there were no other unfair labor charges, (c) Hoskins was not treated disparately, (d) the Board affirmed the Regional Director's Decision overruling the Union's objections to the conduct of the election, (e) no animus toward Hoskins can be inferred because of her protected activity, and (f) other union activists were not discriminated against; that the employer's request at 4 p.m. on January 28, 1981, was reasonable; that Hoskins' refusal to try to scrape units was unreasonable; that Hoskins was discharged for cause; that the employer had no knowledge that Hoskins was responsible for the filing of the OSHA complaint, that there was no evidence of animus regarding the filing of the OSHA complaint; that the fact Hoskins could have performed other jobs in the plant is immaterial and the fact that Respondent could have taken action such as a suspension or warning begs the issue; and that Hoskins and Nancy Salmons should be discredited.[19]

[18] Grider testified that Respondent did not cooperate in his investigation in that Respondent's management refused to be interviewed regarding this matter. Earlier, Respondent would not voluntarily allow an OSHA inspection of its involved plant regarding the above-described April 1980 incident but rather required OSHA to obtain a court order to gain access to the company facility.

[19] Respondent also argues that the complaint should be dismissed. At p. 1, fn. 1 of its brief it states as follows:

> At the hearing the undersigned pointed out that Respondent was incorrectly named in the Complaint; that Respondent's correct name is Jefferson Electric Company, Division of Litton Systems, Inc. General Counsel expressed no opposition (Tr. 5, LL. 11-16). Moreover, the "Charge Against Employer" [G.C. Exh. 1(a)] is against "Jefferson Electric Co., a Division of Litton Systems." No amended charge was ever filed. To this extent the undersigned move for a dismissal of the complaint against "Jefferson Electric, Williamstown, Division of Litton Industries" [G.C. Exh. 1(a)].

Respondent is correctly described in the body of the complaint. Its motion to dismiss, made for the first time on brief, is denied. Respondent also requests reconsideration of a number of my rulings. In my opinion no sufficient cause has been shown for reversing any of them. There is no need to consider the testimony of Nancy Salmons who testified solely as a rebuttal witness. Therefore, even assuming arguendo that Respondent was justified in requesting a continuance, there was no need to continue this proceeding a second time, for an indefinite period of time.

C. *Analysis*

Respondent's request that Hoskins work within 1 foot of the involved cleaning fluid at 4 p.m. on January 28, 1981, was not reasonable. And there was no legitimate business justification for firing Hoskins when she refused the assignment. Respondent's claim that it was Hoskins' decision to leave and she herself terminated her employment does not alone make it so. Hoskins had no real choice. She did what any reasonable person would have done under the circumstances; she did exactly what the Respondent expected her to do.

Why did Respondent place Hoskins in this position? Respondent claims that because its Venus machine was not operable it needed to utilize a number of workers to remove the drylock from ballasts on final assembly line A at the end of the day on January 28, 1981.[20] But even if that was the case, why would Respondent's management ask Hoskins to perform a task they knew or should have known she would refuse? In my opinion, it is questionable whether a reasonable person would ask anyone to expose themselves to the vapor of mineral spirits if in fact that is the cleaning fluid involved herein. There is no question, however, but that a person acting reasonably would not ask someone to do this if the person asked (1) was hospitalized for 2 weeks as a result of being exposed to the fumes of a chemical process just 9 months prior to the involved incident; (2) was subsequently more sensitive, along with one of the other workers hospitalized, to the vapors from the cleaning fluid; (3) was not assigned this task as a part of her regular job but did it on a temporary basis four or five times a year, for less than a day at a time; (4) had a doctor's statement which stated that she avoid mineral spirits; and (5) could do other work and could have in some other way participated meaningfully in an equitable rotation program. The request was not a reasonable request.

Was Respondent's reaction reasonable? Was there a business justification for firing Hoskins? No evidence was introduced by Respondent to show that it had ever fired anyone else for refusing a temporary assignment to work with or near the involved cleaning fluid. In fact, although asked for, there is no evidence, other than Buffin's pure speculation, that Respondent ever fired anyone for either refusing to work with the involved cleaning fluid or for experiencing a problem with the involved cleaning fluid prior to the time the charge was filed herein. Buffin was not a credible witness. If his assertion was correct, Respondent could have introduced its business records. No weight is given to the fact that Respondent fired three probationary employees after the charge was filed herein. A part of their regular job was working with the cleaning fluid. The fact that they were hired and fired after the charge was filed herein and Respondent did not demonstrate that it had in fact taken similar action before forces me to conclude that these actions were no more than an attempt on Respondent's part to bolster its position. Two other employees who were permanently assigned tasks involving the use of the involved cleaning fluid were allowed to transfer. Hoskins was treated disparately and no lawful reason was given for the disparate treatment.

The General Counsel demonstrated that Hoskins was an obvious union supporter, a fact known to Respondent, and that she was not afraid to, and did, cross swords with management during the union organizing drive. It was not demonstrated that anyone else challenged and embarrassed Lee the way Hoskins did. And it was not demonstrated that any other union activist was willing to go so far as to graphically equate management's refusal to allow employees to ask questions at a meeting with communist tactics, and thereby embarrass management into allowing questions.

The fact that Respondent's witness did not testify credibly about the OSHA representative's in-plant interview with Hoskins demonstrates that management was concerned that being candid about this matter would damage Respondent's position. In my opinion, Respondent concluded long before January 1981 that Hoskins was behind their problem with OSHA but it hesitated to do anything which would jeopardize the results of the October 1980 election. Respondent, notwithstanding the size of the fine, viewed this incursion as a serious matter. It forced OSHA to obtain a court order to initially gain access to the plant. Buffin personally accompanied the OSHA representative when he spoke with employees in the plant, and Buffin stood within hearing range so that he could make sure the representative was not conducting a confidential inquiry.

The grounds given by Respondent for Hoskins' firing are pretextual. Since there was no legitimate business justification for the firing there was no dual motive and, therefore, *Wright Line*, supra, does not apply.

Lacking a lawful reason for the firing, one is left only with unlawful reasons, viz, Hoskins' union activities and her protected concerted activities. Regarding the latter,

[20] R. Exh. 23 raises a number of questions that its sponsoring witness, Cummings, could not adequately answer. The exhibit is atached hereto as Appendix A. A perusal of the exhibit reveals that while it is captioned "1-22-81 to 1-30-81" the first date on the page is "1-26-81"; that the first date, "1-26-81" appears to be written over "1-22-81;" that the next date "1-27-81" appears twice and the first time it appears to been written over 1-23-81, and then both are crossed out; that the next date appearing on the page, "1-29-81" is out of sequence and, as admitted by Cummings (Tr. p. 1240), is written over an erasure; that the number which was erased may have been a 6 making the erased date 1-26-81; that for the first time in the exhibit the day of the week is written in the second column from the left on the 1-29-81 entry (compare entries on R. Exh. 22, a similar exhibit where the day of the week is never given.); that the day of the week is given also in the next entry (A possible explanation is that because of the reverse order of the dates someone felt constrained to give the day of the week also.); and that at least one of the numbers of the 1-28-81 entry appears to been written over another number, i.e., "5" appears to be written over "2." Cummings did not prepare the document and its preparer was no longer with the Company. If the Venus machine broke down Friday, January 23, 1981, the repair parts could and most likely would have been ordered that day. They could have been transported over the weekend and could have arrived Monday, January 26, 1981; Tuesday, January 27, 1981; or even early Wednesday, January 28, 1981. If that was the case, the Venus machine could have been repaired prior to the confrontation between Hoskins and Respondent's management. But if that were the case, then R. Exh. 23 would be a fabrication. Cummings testified, however, that he was personally familiar with and verified what occurred with the Venus machine on the dates specified on R. Exh. 23. Surely, the exhibit is not a fabrication for if it ever became an issue it would be too easy to prove, i.e., there would be records showing when the parts were ordered and when they were transported. And surely Cummings, under the circumstances, would not have testified that the exhibit correctly depicts events as they occurred.

compare *Alleluia Cushion Co.*, 221 NLRB 999 (1975). Hoskins' firing was in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Yvonne Bonnie Hoskins because she joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discharged Yvonne Bonnie Hoskins in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent offer Hoskins immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges and make her whole for any loss of pay she may have suffered as a result of the discrimination against her by payment to her of a sum of money equal to that which she would have earned as wages during the period from the date of her discharge to the date on which Respondent offers reinstatement less her net earnings, if any, during said period, with interest thereon to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[21]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Jefferson Electric Company, a Division of Litton Systems, Inc., Williamstown, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have joined, supported, or assisted the union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Offer Yvonne Bonnie Hoskins immediate and full reinstatement to her former or substantially equivalent job and make her whole for any loss of earnings she may have suffered by reason of Respondent's discrimination against her in the manner and to the extent set forth in the section herein entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(c) Post at its facilities in Williamstown, Kentucky, copies of the attached notice marked "Appendix B."[23] Copies of said notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director 9, in writing within 20 days from the date of this Order what steps have been taken to comply.

[21] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise punish you because you have joined, supported, or assisted any union or engaged in concerted activities for mutual aid or protection.

WE WILL NOT discharge you or otherwise discriminate against you in regard to your hire or tenure of employment or any term or condition of employment, to discourage membership in the International Brotherhood of Electrical Workers, Local Union 1533, AFL-CIO-CLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your

rights under the National Labor Relations Act. These rights are:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of your own choosing

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from any such activities.

Our employees are free to exercise any or all of these rights, including the right to join or assist the International Brotherhood of Electrical Workers, Local Union 1533, AFL-CIO-CLC, or any other union. Our employees are also free to refrain from any or all such activities.

WE WILL offer Yvonne Bonnie Hoskins reinstatement to the job of which she was unlawfully deprived or, if such a job no longer exists, a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole, with interest for any loss of pay she may have suffered by reason of her discharge.

JEFFERSON ELECTRIC COMPANY, A DIVISION OF LITTON SYSTEMS, INC.